Wong Nam Loi v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P-05-86 OF 1994
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
13 SEPTEMBER 1997

Criminal Law *— Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Whether appellant had knowledge of drugs — Knowledge inferred from surrounding circumstances — Presumption of possession — Dangerous Drugs Act 1952 s 39B(2)*

On 28 July 1989, the appellant was driving a motor van from Butterworth to Nibong Tebal when he was stopped by the police at a road block. The police found a refrigerator lying on its side behind the driver's seat. On examination of the refrigerator, the police found 80 blocks of white substance inside, confirmed by the government chemist to be heroin weighing 20,269.5gm.

In his defence, the appellant said that he was an innocent carrier of the refrigerator which belonged to a friend known as 'Lim' and had no knowledge of its contents. The trial judge found that the appellant had knowledge of the drugs by inference from the following circumstances, that: (i) the appellant did not protest nor display any conduct consistent with his lack of knowledge of the drugs when the drugs were found; (ii) after the appellant was arrested and handcuffed, he pointed to the refrigerator and uttered words to the effect that if there was anything illegal, it was in the refrigerator; and (iii) on the way to the police station, the appellant admitted to conveying a few katis of the drugs and tried to bribe the police officers. The court convicted the appellant for an offence of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced him to death under s 39B(2) of the Act. The appellant appealed.

Held, dismissing the appeal:

(1) The prosecution has to prove that the appellant had knowledge that the drugs were in the refrigerator for the presumption of possession to arise. Mere proof of custody and control is insufficient as there cannot be possession without knowledge. Knowledge may be inferred from the surrounding circumstances, as the trial judge had rightly done in this case (see p 798F–I); *Leow Nghee Lim v R* [1956] MLJ 128 followed.

(2) The uttering and the gesture of pointing to the refrigerator was rightly admitted. It is presumed that the uttering of the words by the appellant was admitted under s 27 of the Evidence Act 1950 as a statement leading to discovery, since the drugs were discovered after the making of the oral statement and gesture (see p 799A–C).

(3) There was ample evidence both direct and by necessary inferences to show that the appellant knew that the refrigerator contained

heroin. The defence had not rebutted the presumptions of possession and trafficking, nor had it raised any reasonable doubt on the prosecution's case (see p 799G–H).

[Bahasa Malaysia summary

Pada 28 Julai 1989, semasa perayu memandu sebuah motor van dari Butterworth ke Nibong Tebal dia telah dihentikan oleh polis di suatu sekatan jalan. Polis menjumpai sebuah peti sejuk yang tersandar di belakang tempat duduk pemandu. Selepas pemeriksaan ke atas peti sejuk itu, polis menjumpai 80 blok bahan putih di dalamnya, yang disahkan adalah heroin sebanyak 20,269.5gm oleh ahli kimia kerajaan.

Dalam pembelaan, perayu mengatakan bahawa dia adalah seorang pengangkut peti sejuk kepunyaan seorang rakan yang dikenali sebagai 'Lim' yang tidak bersalah dan tidak tahu tentang kandungannya. Hakim perbicaraan mendapati bahawa perayu tahu tentang dadah itu menerusi inferens dari keadaan-keadaan berikut, bahawa: (i) perayu tidak membantah atau menunjukkan sebarang kelakuan yang konsisten dengan ketidaksedaran tentang dadah ketika dadah dijumpai; (ii) selepas perayu ditangkap dan digari, dia telah menunjuk jari pada peti sejuk dan melafazkan bahawa sekiranya terdapat apa-apa yang menyalahi undang-undang, ia boleh didapati dalam peti sejuk itu; dan (iii) semasa perjalanan ke balai polis, perayu mengakui pernah mengangkut beberapa kati dadah dan cuba menyogok pegawai-pegawai polis. Mahkamah menyabit perayu untuk kesalahan pengedaran di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan menjatuhkan hukuman mati di bawah s 39B(2) Akta tersebut. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Pihak pendakwaan harus membuktikan bahawa perayu tahu dadah berada dalam peti sejuk untuk membangkitkan anggapan milikan. Bukti tentang jagaan dan kawalan sahaja tidak mencukupi kerana milikan tanpa pengetahuan adalah tidak mungkin. Pengetahuan boleh disimpulkan daripada keadaan sekeliling, sebagaimana yang telah dilakukan dengan betulnya oleh hakim perbicaraan dalam kes ini (lihat ms 798F–I); *Leow Nghee Lim v R* [1956] MLJ 128 diikut.

(2) Kata-kata yang dilafazkan dan gerak isyarat yang menunjuk jari pada peti sejuk telah diterima dengan betulnya. Adalah dianggap bahawa kata-kata yang dilafazkan oleh perayu diterima di bawah s 27 Akta Keterangan 1950 sebagai pernyataan yang membawa kepada penzahiran, kerana dadah dijumpai selepas pernyataan lisan dan gerak isyarat dibuat (lihat ms 799A–C).

(3) Terdapat keterangan langsung dan inferens yang perlu yang lebih daripada mencukupi untuk menunjukkan bahawa perayu tahu peti sejuk itu mengandungi heroin. Pihak pembelaan tidak mematahkan anggapan milikan dan pengedaran, dan tidak juga membangkitkan sebarang keraguan munasabah atas kes pihak pendakwa (lihat ms 799G–H).]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 83–228.

Case referred to

Leow Nghee Lim v R [1956] MLJ 128 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37A, 39B(1)(a), 39B(2)
Evidence Act 1950 s 27

Appeal from: Criminal Case No 47–26 of 1990 (High Court, Pulau Pinang)

Ahmad Johari bin Hamzah (*Aj Hamzah & Co*) for the appellant.
Azahar Mohamed (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): The appellant was convicted by the Penang High Court for an offence of trafficking in 20,269.5gm of heroin alleged to have been committed on 28 July 1989 in front of the Nibong Tebal police station, an offence under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). He was accordingly sentenced to death.

The facts leading to the arrest of the appellant are not in dispute and they are that at 6.50am on 28 July 1989, the appellant was seen driving a motor van bearing registration No BCR 7161 along the main trunk road from Butterworth to Nibong Tebal. It so happened that at about that time the police had put up a road block in front of the Nibong Tebal police station and when the appellant arrived at the said road block, he was stopped. On examination of the van, the police found a twin door refrigerator lying on its side behind the driver's seat. In the glove compartment was also found the appellant's international passport, driving licence, Public Services Vehicle licence badge, income tax assessment notice and two receipts issued by the London Hotel in Penang.

When the refrigerator was examined by the police, they found inside four plastic bags containing a total of 80 blocks of white substance wrapped in plastic sheets, believed to be heroin and indeed confirmed by the government chemist to be heroin weighing 20,269.5gm. The appellant was the driver and sole occupant of the van transporting the refrigerator in which the police recovered the heroin.

The appellant in his defence on oath testified that he was a businessman dealing in plastic bags prior to 28 July 1989. On 4 July 1989, he went to Padang Besar, near the Perlis-Thai border where he met a friend simply known to him as 'Lim'. Apparently, this Lim requested him to take a refrigerator and a slot machine to Kuala Lumpur, which request he casually agreed. He then parked the van in the compound of a mosque

in Padang Besar, and proceeded to Thailand by taxi. He claimed that between 21 July 1989 and 25 July 1989 he was in Haadyai, Thailand, where he purchased some Korean ginseng and two deer penises. He returned to Padang Besar, took his van and drove it to a spot in front of the Padang Besar taxi stand, commonly used by him and other traders. There, he met Lim again and once more Lim repeated his request about the refrigerator and slot machine to be delivered to Kim Mun Used Car in Kuala Lumpur. The appellant agreed and soon after Lim and two others brought a refrigerator and a slot machine. The appellant said that as he was busy trading, he handed over the van keys to Lim who loaded the refrigerator and the slot machine. The appellant said that the refrigerator doors were shut and a string was tied around it. The appellant said that he had known Lim for eight years and had no reason to suspect anything and as such, he did not inspect the refrigerator. At about 6 pm on 25 July 1989, he left Padang Besar for Penang and arrived in Penang at 9 pm the same night. That night, the appellant testified that he slept in the van but for the next two nights he slept at a hotel called London Hotel in Georgetown, hence the receipt from the hotel. He did not, however, explain why he slept in the van the first night. At 5.30 am on 28 July 1989, he left Penang for Kuala Lumpur where he was stopped and detained at the road block at Nibong Tebal. He testified that he only knew that the refrigerator contained 'something' when it was being unloaded from the van, and the refrigerator door opened and 'something' fell out. He was asked by one of the police officers what it was and he replied that he did not know. The sum total of the appellant's defence is that he had no knowledge whatsoever of the contents of the refrigerator. In other words, his defence is that he was an innocent carrier of the refrigerator which in fact belonged to Lim, and furthermore, he himself did not load it into his van but Lim did.

Whilst the prosecution had succeeded in proving the appellant had custody and control of the refrigerator, for the presumption of possession of the heroin concerned, it is also incumbent on the prosecution to prove that the appellant had knowledge that the drugs were in the refrigerator. Without proof of knowledge or to impute such knowledge to the appellant, mere proof of custody and control is insufficient. In *Leow Nghee Lim v R* [1956] MLJ 28, a case of possession of opium, Taylor J expounded and discussed the word 'possession'. At p 30 of his judgment he said:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies full or exact knowledge ... .

Therefore, it seems clear that without knowledge there cannot be possession. In most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances. The learned trial judge came to the conclusion that the appellant had knowledge of the contents of the refrigerator based on the following surrounding circumstances and facts adduced at the trial. Firstly, the appellant's behaviour during the search of the refrigerator in his presence at the Ibu Pejabat Daerah Nibong Tebal ('IPD'), when the blocks of white substances were seen, the appellant remained silent. He made no protest nor exhibited any conduct consistent with his lack of knowledge of the substances.

Secondly, the appellant's conduct in pointing to the refrigerator ('P22') with his handcuffed hands and uttering certain words to the effect that if there was anything illegal, it was in the refrigerator. These words were uttered after Insp Shahrul Anuar bin Md Idris ('SP7') questioned the appellant as to where the illegal stuff was. The learned judge did not mention under what provisions of the law he admitted the oral statement including the pointing towards the refrigerator. Since the appellant had already been arrested and handcuffed and since the discovery of the drugs was after the oral statement and the gestures, we presumed that the statement was admitted under s 27 of the Evidence Act 1950 as a statement leading to discovery. Before the statement and gesture, there is no evidence to indicate that the police knew where the drug was, albeit it would have been discovered eventually. Nevertheless, it was discovered after the making of the statement. Therefore, we are of the view that the statement and the gesture of pointing to the refrigerator were rightly admitted.

Thirdly, the learned judge also admitted and considered other statements made by the appellant to SP7 while they were on their way to the IPD. The gist of these statements is that the appellant admitted conveying a few katis of the illegal stuff and tried to offer a bribe of RM5,000 to each of the police officers in the vehicle. The learned defence counsel immediately objected to the admissibility of the statements on the ground that the statements were not made voluntarily, not that such statements were not made at all. The court then conducted a trial within a trial to consider the voluntariness and admissibility of the statements under s 37A of the Act. It transpired during the trial within the trial that after the appellant was detained and taken to the police station, SP7 administered the caution through an interpreter one Detective Corporal Ridzuan Lim @ Lim Soo Peng ('SP10'). On the totality of the evidence adduced at the trial within a trial, the learned judge came to the conclusion that the appellant was duly cautioned and that he understood the caution and that the statements he made during the journey was voluntary and admitted the oral statements. After scrutinizing the record of the trial within a trial, we have no reason to disagree with that finding.

From the totality of the evidence adduced both by the prosecution and the defence at the trial, we are satisfied and we agree with the finding of the learned judge that there is ample evidence both direct and by necessary inferences to show that the appellant knew that the refrigerator he was conveying contained heroin. The defence has in no way rebutted the presumption of both possession and trafficking, nor has the defence raised any reasonable doubt on the prosecution's case. This case is based on the finding of facts by the trial court. We have no reason to disturb the finding of facts by the learned judge. We are satisfied that on the evidence he was rightly convicted. We had, therefore, dismissed the appeal and confirmed the conviction and sentence.

Appeal dismissed.

Reported by David Lai